In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5746

FRANK ALVAU and HUMBERT ROSSI,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable GEORGE M. BOURQUIN, Judge

PETITION OF APPELLEE FOR REHEARING

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To the Judges of the Above Entitled Court:

Comes now the appellee by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Assistant United States Attorney for said District, and respectfully petition the court for a rehearing in the above entitled cause

and in support of their petition show to the court as follows:

QUESTIONS TO BE RAISED

The questions to be raised in this petition are as follows:

1. As to defendant Alvau the Government's contention was thoroughly argued before this court on June 12, 1929 and was thoroughly set forth in the Government's Brief which the opinion of this honorable court shows has been considered. As to the defendant Alvau, however, the government requests the court to give further consideration to the case of United States v. Page, 277 F. 459, a case from the District Court of Virginia, wherein it was held that Internal Revenue officers have a right to enter a distillery, or premises used as such, without a search warrant. either in the day time or night time and that as a corollary of such right they are entitled to break into a building wherein they believe a distillery or distilling apparatus is located, at any time of the day or night. The Government wishes also to respectfully suggest to this court that if the opinion of this court in the instant case is to stand, the purpose and object of the Statute allowing internal revenue agents to search a

still site without a warrant will necessarily have to be deviated from.

2. The greater portion of this petition will be taken up by the Government's argument with reference to the position of defendant Rossi in this case. It is our position that as Rossi was only a guest of Alvau for the evening and denied ownership and any interest in the house searched and the illicit paraphernalia seized, that he is not in a position in the instant case to assert that the search and seizure as to him was invalid, and that therefore, as to him at least, this court should affirm the judgment and sentence of the trial court.

ARGUMENT

It was stated in the opinion of this court that Rossi being temporarily domiciled in the house of Alvau as a guest, and having moved to strike the Government's evidence at the end of the Government's case, was in a position to assert the violation of his rights under the Fourth Amendment of the Constitution of the United States. Rossi testified at the time of the trial as follows:

> "On the 12th day of July, 1928, I was working for the Metropolitan Life Insurance Company. I went out there to try to revive some insurance that had been in existence with my company and

I had gone there to see them about being reinstated. I had insurance upon one of the members of the Alvau family upon which the premium was just past due, (Tr. 124); and he further testified as follows: (Tr. 125). I arrived there about 8 o'clock or so in the evening, having taken a public bus. After I stayed pretty late talking insurance. Frank (Alvau) invited me to stay all night. It was a hard case to try to sell him. I stayed all night; I went to bed and in the middle of the night heard the dogs barking; it was ten minutes or a quarter of three in the morning. It was dark and rainy. I asked Frank what was the matter and he said 'I am afraid they are burglars'. We jumped out of bed and Frank said: 'See what is wrong'. I ran for my clothes in the closet; there was a hanger there and some hooks, was the reason it fell to the floor and I couldn't find my clothes. Frank threw me a pair of overalls and I put them on. * * * I asked him where I was going to hide and he grabbed me by the hand and took me to the basement. He said: 'Here is a place for you'. We went to the wall and I heard him scratch something. He said: 'Here is a place'. I said: 'No, I can't see nothing'. I had been in the place about five hours. * * * (Tr. 126). The place in which I was located was just underneath the kitchen and the bath room. I worked for the Metropolitan Life Insurance Company after arrest for about a week or over, when I resigned because my name was in the paper in connection with this business. I have since been working in a grocery store."

On cross examination the witness Rossi further testified as follows:

(Tr. 126) "I didn't turn on the lights for the

agent—he had a flash light. I didn't know anything about the still or mash. My clothes didn't smell of mash or whiskey".

We thus see that Rossi testified that he went to Alvau's place on the evening of the 12th to sell him some insurance and did not contemplate spending the evening until late in the evening after experiencing difficulty in attempting to sell Alvau insurance, Alvau invited him to spend the evening there. And it will further be seen from his testimony that he was not even temporarily domiciled in the house but spent only a portion of the evening there as Alvau's guest and his testimony shows that immediately after the raid he went back to Seattle to renew his work with the life insurance company and that he spent only one evening with Alvau.

The testimony above quoted further shows that he asserted no interest in the still or mash and that he alleged that he had no knowledge of the existence of said articles and materials. How can it then be said that he, being temporarily domiciled in the residence of Alvau as a guest, is entitled to the benefit of his motion to strike the Government's evidence at the end of the Government's case, on the ground that the same was obtained in violation of his (Rossi's) Constitutional rights?

May we suggest to this honorable court that if the decision in the instant case as to Rossi is to be followed by the trial courts of this circuit, that it must be held by said trial courts that anyone who aids and abets another in an unlawful liquor transaction and who stays at the home of his co-defendant a few hours may, even though he denies ownership of the premises and denies any interest in the illicit articles seized, claim that the search and seizure as to him was invalid on account of the infringement and impairment of his Constitutional rights under the Fourth Amendment.

It is our position that this court, and other Federal courts, have held in many cases in which the facts were analogous with the case at bar, that a person such as Rossi, for failing to timely move to suppress the evidence and by failing to assert an interest in the premises searched or the articles seized, was thereby precluded from attacking the validity of the search of said premises and the seizure of said articles.

In MacDaniel v. United States, 294 F. 769, where it was held that one who did not timely move to suppress the evidence and who did not assert an interest in the articles alleged to have been unlawfully seized. was not in a position to claim suppression of the same as evidence, the court said, at page 771:

"Passing all questions as to the legality of the search and seizure, we agree with the view of the court below. An objection of this nature, it is well settled, is available only to the person whose premises have been unlawfully searched and whose documents have been unlawfully seized. See Remus v. United States (6 C. C. A.) 291 Fed. 501, 511; Haywood v. United States (7 C. C. A.) 268 Fed. 795, 803. In Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309, and Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263, it is held that officers of a corporation may be compelled to produce corporate records and documents, even after they have succeeded to the title thereto, and that the same may be used in evidence against them on a criminal charge".

In Nielson v. United States, 24 F. (2d) 802, (9th C. C. A.), this court held that the rights of defendants having no interest in premises searched, are not invaded by the search and seizure thereof, stating on page 803 as follows:

"There being no evidence tending to connect him with the activities of the defendants or to show that he had knowledge thereof, or was associated with them in any common purpose, there could be no prejudice to their rights in denying his petition to suppress. The prohibition against unreasonable search and seizure is for the benefit of the person whose rights are invaded. The rights of the defendants here were in no way invaded by

> the search and seizure and they were in no position to demand suppression of the evidence thus obtained. Chicco v. United States, 284 F. 434; Graham v. United States, 15 F. (2d) 740; Rosenberg v. United States, 15 F. (2d) 179; Cantrell v. United States, 15 F. (2d) 953".

In Segurola v. United States, 275 U. S. 106, the Supreme Court of the United States after holding that the defendant had waived his rights to attack the search and seizure by failing to timely move for suppression of the evidence, went on to say:

> "A court when engaged in trying a criminal case will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence, because the court will not, in trying a criminal case, permit a collateral issue to be raised as to the source of competent evidence; to pursue it would be to halt the orderly progress of the cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. In other words, in order to raise the question of illegal seizure and an absence of probable cause in that seizure, the defendants should have moved to have the whiskey and other liquor returned to them as their property and as not subject to seizure or use as evidence".

This court has always followed the rule laid down in the above mentioned cases, as evidenced by the following cases:

Souza v. United States, 5 F. (2d) 9 (9th C. C. A.)
Armstrong v. United States, 16 F. (2) 62 (9th C. C. A.).
Lewis v. United States, 6 F. (2d) 222, (9th C. C. A.).

In the Armstrong case, supra, this court stated:

> "Nor does the record show that the defendant made any claim, either to the premises searched or the property seized, and in the absence of such claim cannot urge unreasonable search upon which to base a constitutional right. See Lewis v. United States, 6 F. (2d) 222. The intention of Section 269, supra, as amended, is that the complaining party must show that he was denied a substantial right. Haywood v. United States, 268 F. 795; Williams v. United States, 265 F. 625. This he has done".

Along the same line and to the same effect see Goldberg v. United States, 297 F. 98. In Patterson v. United States, 31 F. (2d) 737 (9th C. C. A.), defendant Patterson was arrested while entering the portals of his lodging house after liquor had been found in a room alleged by the Government to be defendant Patterson's room. Patterson in that case did not move prior to time of trial for suppression of the evidence, and at the time of trial said that the room in which the liquor was found was his brother's room, although defendant Patterson's clothing and effects were found therein. The record in the Patterson case

shows defendant Patterson moved at the end of the Government's case for suppression of the evidence and for an Order striking the same.

As shown in the opinion of this court and the record in the Patterson case, the officers had no search warrant, there was no evidence of sale and no facts were shown which gave the officers probable cause to make the search without a warrant, but it was held by this court that Patterson, although his suitcase and effects were found in the room, was not in a position to say the search warrant was illegal because he denied ownership of the liquor and failed to timely move for the suppression of the evidence.

Certainly defendant Rossi in the instant case is in no better position to attack the search and seizure in the case at bar than was the defendant in the Patterson case.

In Rosenberg v, United States, 15 F. (2d) 179. a case often cited by this honorable court in its decisions in search and seizure cases, it was held that the defendant was precluded from attacking the seizure because he failed to assert any interest in the property seized in the still room, as he claimed to have leased the premises. The court in the Rosenberg case said:

"It is next charged that the search warrant

and return thereof were insufficient and that the evidence secured thereunder should have been excluded. The answer to this is that the defendant disclaimed any ownership or interest in the property seized in the still room, claiming to have leased the premises. The Goldberg case, 297 F. 98. holds that the defendant cannot avail himself of the illegality of the search of a place with which he had no connection or the seizure of property in which he claims no interest. See also Chicco v. United States, 284 F. 434. None of the liquor found was on the part of the premises occupied by the defendant as living quarters. The jury found on the other counts that it was not his and defendant's counsel in his opening stated that it was unknown to defendant and he had nothing to do with it".

So in the case at bar Rossi cannot be said to have asserted an interest in the premises searched or the articles seized merely because after talking with Alvau with reference to the sale of some insurance policies, it became late and he decided to spend the evening as Alvau's guest. He is certainly in no better position to attack the validity of the search in this case than were the defendants in the Rosenberg and Patterson cases, supra. It will be remembered by this court that at the argument of this case June 12th, counsel for defendant Rossi stated practically in substance that inasmuch as the record did not show a timely motion to suppress by Rossi or an assertion of any interest by him in the ar-

ticles seized, that he could not predicate error on the court's refusal to strike the testimony, but that his main and particular grievance was the unfair and prejudicial instructions of the trial court.

However, at this time as was done at the time of argument in this case, Government counsel respectfully call to this court's attention the fact that no exceptions were saved by defendant's counsel to said instructions. (Tr. 143).

In view of all the foregoing, it is respectfully submitted that a rehearing should be granted in the instant case.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney.

TOM DE WOLFE,
Assistant United States Attorney

CERTIFICATE

It is hereby certified that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated at Seattle, Washington, this 10 day of July, 1929.

ANTHONY SAVAGE,
United States Attorney,

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